In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 802

BENNETT E. MEYERS, PETITIONER

v.

UNITED STATES OF AMERICA AND DONALD CLEMMER, DIRECTOR, DEPARTMENT OF CORRECTIONS, DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Counts 1, 3, and 5 of a six-count indictment (R. 2–7) filed on December 19, 1947, in the District Court for the District of Columbia charged that Bleriot H. Lamarre, on October 4 and 6, 1947, gave false testimony, in three specified respects, before a subcommittee of a special Senate Committee to Investigate the National Defense Program, in violation of 22 D. C. Code (1940 ed.) 2501. Counts 2, 4, and 6 charged petitioner with having suborned the respective perjuries. Lamarre pleaded guilty to all three perjury counts (R. 368). Petitioner, following a trial by jury, was found guilty on all three subornation counts

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(R. 391) and was sentenced generally to imprisonment for from 20 months to five years (R. 391–392). On November 8, 1948, petitioner's conviction was affirmed, *Meyers* v. *United States,* 171 F. 2d 800 (C. A. D. C.), and on February 14, 1949, this Court denied a petition for a writ of certiorari, 336 U. S. 912.

On July 1, 1949, petitioner filed in the District Court for the District of Columbia, pursuant to 28 U. S. C. 2255, a motion to set aside his conviction on grounds presently to be mentioned (R. 403–427). This motion was denied on July 25, 1949 (R. 428–429), and petitioner noted an appeal (R. 429–430). On October 5, 1949, petitioner filed in the same court a petition for a writ of habeas corpus (R. 441–451) challenging the validity of his conviction on the same grounds as those on which the proceeding under 28 U. S. C. 2255 was based. On October 24, 1949, the habeas corpus petition was dismissed for the reason that it did not appear that the remedy by motion to vacate (appeal from the denial of which was then pending) was inadequate or ineffective to test the legality of petitioner's detention (see 28 U. S. C. 2255, last paragraph) (R. 452). Petitioner also noted an appeal from the latter order (R. 452–453). On December 16, 1949, the two appeals were ordered consolidated by the Court of Appeals (R. 466), and on April 10, 1950, both judgments of the District Court were affirmed (R. 471). The petition for a writ of

certiorari seeks review of the judgment of affirmance.[1]

The purpose both of petitioner's motion to have his conviction set aside and of his petition for a writ of habeas corpus was to take advantage, by a collateral attack on the judgment of conviction, of this Court's ruling in *Christoffel* v. *United States,* 338 U. S. 84, decided June 27, 1949, four months after the Court's denial of certiorari to review the judgment of the court below affirming petitioner's conviction (see R. 404 [paragraph 9], 425–426, 442–448). In the *Christoffel* case, the Court held that in a prosecution under 22 D. C. Code (1940 ed.) 2501—the same statute that petitioner and Lamarre were convicted of violating—it is necessary for the Government to prove, and for the jury to find under proper instructions, that at the exact time an allegedly false statement was made before a congressional committee, a

[1] In addition to the two proceedings in the District Court for the District of Columbia which we have mentioned, petitioner brought a habeas corpus proceeding, based on the same grounds relied on in the District of Columbia proceedings, in the District Court for the Eastern District of Virginia. The Virginia proceeding was brought after the District of Columbia court's denial of the motion under 28 U. S. C. 2255, but before the bringing of the habeas corpus proceeding in that court. The Court of Appeals for the Fourth Circuit affirmed an order denying the Virginia petition for habeas corpus, both on the ground that the availability of relief by motion to vacate under 28 U. S. C. 2255 precluded resort to habeas corpus, and also on the merits of the controversy. See *Meyers* v. *Welch*, 179 F. 2d 707. Petitioner did not seek review of the Fourth Circuit's judgment.

quorum, or majority, of the committee was present. An instruction that it would suffice for the jury to find that a quorum was in attendance when the committee was convened, provided no point was thereafter raised as to the lack of a quorum, was held to be erroneous. For the reasons which follow, we submit that the judgment below affirming the orders denying the motion to vacate petitioner's conviction and denying the petition for habeas corpus is correct.

The full subcommittee before which petitioner's codefendant, Lamarre, testified on October 4 and 6, 1947, consisted of five Senators (R. 52). According to the undisputed evidence of the Government, three of these Senators—Ferguson, Cain, and McGrath—were in attendance during Lamarre's testimony on October 4th (R. 24, 52), and two—Senators Ferguson and Cain—were present during Lamarre's testimony on October 6th (R. 52). Petitioner, following the close of the evidence, asked the court to instruct the jury that "there must have been present at least three members of that subcommittee physically in the committee room" when Lamarre gave his alleged false testimony, in order to find petitioner guilty (Requested Instructions 51 and 52, R. 352–353). The court declined to give these instructions (R. 360), remarking that "The only person who can raise the objection of no quorum present is one of the [subcommittee members] actually present" (*ibid.*). However, petitioner

did not rely on the refusal of the court to give these requested instructions, or their substance, either on his appeal to the Court of Appeals or in his petition for certiorari in this Court.

In challenging, in the Court of Appeals, the "competency" of the subcommittee before which Lamarre testified, petitioner distinguished between the two days—October 4 and 6, 1947—on which Lamarre's testimony was given. His attack on the competency of the subcommittee which sat on October 4th was based on a claim that two of the three Senators concededly present and purporting to act as members of the subcommittee on that day (Senators Ferguson and Cain) had never validly been appointed to the subcommittee because, it was argued, they had never validly been appointed even to the full committee. His attack on the competency of the subcommittee which sat on October 6th (Senators Ferguson and Cain alone; see *supra,* p. 4) was based on the same ground and on the independent ground that, even if they were qualified members of the subcommittee, they constituted less than a quorum.[2] The Court of Appeals accepted petitioner's contention that the subcommittee that sat on October 6th was not

[2] See pp. 25–26, 34–45 of petitioner's brief in the Court of Appeals on his original appeal from his conviction, a copy of which is filed herewith for the Court's consideration.

"competent" because, according to the undisputed evidence, less than a quorum were present on that day, but rejected the above-mentioned argument whereby petitioner sought to show the incompetency of the subcommittee that sat on October 4th. The court said (171 F. 2d 800, 811–812):

> * * * On October 6, 1947, however, only two senators were present at the hearing. Since they were a minority of the subcommittee, they could not legally function except to adjourn. For that reason, the testimony of Lamarre given on that day cannot be considered as perjury nor can appellant be convicted of suborning it.
>
> But practically all Lamarre's testimony was given on October 4, when a quorum was present. The proceedings of that day contain the perjurious statements described in all three counts, and his examination on October 6 was largely repetitious.

In his petition for a writ of certiorari to review this judgment (No. 467, October Term, 1948), petitioner renewed his challenge of the competency of the subcommittee that sat on October 4th, but the argument was based, as in the Court of Appeals, on the alleged legal disqualification of Senators Ferguson and Cain (two of the three Senators admittedly present) to sit as subcommittee members (see pp. 2, 9, 10, 16, 20, 21–22, 30–31, 36–37). He still did not rely

on the trial court's refusal to grant the two requested instructions referred to above.[3]

Thus, what we may conveniently refer to as the *"Christoffel"* point—*i. e.*, that the jury must be instructed, in a prosecution under 22 D. C. Code (1940 ed.) 2501, that, to convict, they must find the alleged false statements to have been made before a "competent" tribunal, which, in the case of a congressional committee or subcommittee, must consist of at least a quorum, physically and actually present at the very time the false statements are made—was, though latent in petitioner's trial, never pressed by him either on his appeal to the Court of Appeals or in his petition for certiorari in this Court. In these circumstances, the instant proceedings are governed, as recognized by the court below (R. 469), by the principle that neither habeas corpus nor a motion to vacate under 28 U. S. C. 2255[4] may be resorted to for the purpose of correcting trial errors that

[3] It is true that petitioner mentioned the trial court's denial of these requested instructions in his "Summary Statement of the Matter Involved," at page 8 of the petition for certiorari. But that he did not rely on this as a reason for granting certiorari is clear from his failure to include any reference to the order of denial among the "Questions Presented" (former Pet. 2), the "Specification of Errors" (*id.* 20), the "Reasons for Allowance of the Writ" (*id.* 14–18), or the "Argument" (*id.* 23–41, especially at 29–37).

[4] The scope of review of a conviction under 28 U. S. C. 2255 is coextensive with the scope of review of a conviction in a habeas corpus proceeding. See *Meyers* v. *Welch*, 179 F. 2d 707, 708 (C. A. 4), and cases cited.

do not affect the court's jurisdiction. *Sunal* v. *Large,* 332 U. S. 174; see also *Warring* v. *Colpoys,* 122 F. 2d 642 (C. A. D. C.), certiorari denied, 314 U. S. 678.

In the *Sunal* case, Sunal and Kulick, in prosecutions for refusing to submit to induction under the Selective Training and Service Act of 1940, were denied leave to adduce evidence at their trials tending to show that their selective service classifications were invalid, even though they had exhausted their administrative remedies in this respect. They were convicted, and did not appeal. Thereafter, this Court, in *Estep* v. *United States,* 327 U. S. 114, held on comparable facts that a defendant in such circumstances had a right to adduce evidence tending to show that his classification was invalid. Sunal and Kulick then sought to avail themselves of the *Estep* holding by bringing habeas corpus proceedings challenging their convictions. This Court held, however, that the trial courts' errors could not be thus corrected. The Court said (332 U. S. at 182):

> An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Con-

stitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process.

The *Sunal* decision is thus on all fours with the case at bar. Indeed, to the extent that they differ on their facts, the difference is adverse to petitioner's position. For, whereas the trial errors in the *Sunal* cases had the effect of depriving Sunal and Kulick of their principal if not their only defense, the ruling at petitioner's trial—refusing to submit to the jury the quorum issue—was hardly prejudicial in view of the undisputed evidence that a quorum was present throughout Lamarre's testimony on October 4, 1947, which, under the decision of the court below affirming petitioner's conviction, sufficed to sustain the conviction.[8]

[8] It is true that the Court said, in the *Sunal* case, 332 U. S. at 181: "Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." This observation of the Court, however, is of no help to petitioner. For, as we have pointed out, though he appealed his conviction and sought certiorari in this Court, neither in the Court of Appeals nor in this Court did he raise the point—the "*Christoffel*" ruling—of which he now seeks to avail himself.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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